

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

BROOKS FAMILY PARTNERSHIP, a
Washington Partnership,

Plaintiffs,

v.

GRANITE STATE INSURANCE
COMPANY, a foreign insurance company,

Defendants.

CASE NO. C09-5723RJB

**ORDER ON DEFENDANT
GRANITE STATE INSURANCE
COMPANY'S MOTION TO
CONFIRM APPRAISAL
AWARD AND DISMISS ALL
CLAIMS FOR AMOUNTS DUE
UNDER POLICY**

This matter comes before the Court on Defendant Granite State Insurance Company's Motion to Confirm Appraisal Award and Dismiss All Claims for Amounts Due Under Policy. Dkt. 31. The Court has considered the pleadings filed in support of and in opposition to the motion and the file herein.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. FACTS

On September 26, 2007, a building owned by Plaintiffs was damaged by fire. Dkt. 1. The building is located at 1303 Commerce Avenue, Longview, Washington. *Id.* Defendant issued a fire insurance policy on the building. *Id.* Defendant agreed to pay for "direct physical

1 loss of or damage to” the building, “caused by or resulting from a covered cause of loss.” Dkt.
2 6-2, at 16. Fire is a “covered cause of loss” under the policy. Dkt. 6-2, at 55.

3 On December 21, 2007, Jack Thomas, Plaintiffs’ public adjuster, submitted to Defendant
4 Plaintiff’s “Claim for Structural Damage with Proof of Loss.” Dkt. 6, at 1-2. Mr. Thomas also
5 informed Defendant “that a subsequent submission would be made regarding code upgrades
6 required by the City of Longview during the reconstruction.” Dkt. 6, at 2.

7 Plaintiff hired Universal Building, Inc.(“Universal,”) a construction company, to draft
8 construction estimates and repair the building. Dkt. 9. According to Mr. Thomas, Plaintiff
9 “elected to repair the building without a settlement with Granite State due to the significant loss
10 of business resulting from the fire damaged building, rendering the building unusable with
11 severe damage, smoke presence, and no heat or air-conditioning.” Dkt. 6, at 3. In any event,
12 representatives of Universal met with City of Longview (“City”) officials to discuss construction
13 permits. Dkts. 8, at 1-2 and 9. Mr. Brinkey, City Director/Building Official, sent a letter to
14 Universal, in March of 2008, regarding “aspects of reconstruction of the building.” Dkt. 8, at 2
15 and 4. Mr. Brinkey (after consultation with structural engineer, Robert G. Rurpin, P.E., hired by
16 Plaintiff) later determined that additional code upgrades would be required for issuance of the
17 permits. Dkt. 8, at 1-2. Mr. Brinkey specifically concurred with the portion of Mr. Turpin’s
18 opinion which stated that:

19 The net result of [International Building Code (“IBC”)] Section 3403.2 is to
20 require the unsound & unreinforced masonry walls on the front and side to be
21 removed down to the existing concrete bond beams just above the upper floor.
22 The rear wall will have to be removed down to the foundation. The parapet on the
23 party wall between buildings will have to be removed to the lower roof line. The
24 party wall seems to be sound below the lower roof.

25 Dkt. 8, at 7. Mr. Brinkey further found, consistent with Mr. Turpin’s assessment, that an
26 “accessible route to the upper floor is required by IBC 3403.1 & IBC 3406.1. The proposed
27 installation of an elevator will provide the accessibility required.” Dkt. 8, at 11.

28 On March 16, 2009, Mr. Thomas submitted Plaintiff’s code upgrade claim to Defendant,
referencing the “Law and Ordinance” provision of the policy. Dkt. 6, at 3.

The policy further provides under “Ordinance or Law”:

1 If a covered cause of loss occurs to a building, we shall pay:

2 1. For loss or damage caused by enforcement of any law that:

3 a. Requires the demolition of parts of the same building not damaged by a
4 covered cause of loss;

5 b. Regulates the construction or repair of buildings, or establishes zoning
6 or land use requirements at the premises described in the Declarations;
7 and

8 c. Is in force at the time of loss.

9 2. The increased cost to repair, rebuild, or construct the building caused by
10 enforcement of building, zoning, or land use law. If the building is repaired or
11 rebuilt, the building shall be intended for similar occupancy as the current
12 building, unless otherwise required by zoning or land use law.

13 Dkt. 6-2, at 40.

14 Parties were unable to agree on either the cost to repair the fire damage or the additional
15 work necessary to comply with building codes and so submitted these disputes to appraisal. Dkt.
16 14, at 3. Plaintiff appointed John Engel as its appraiser. Dkt. 7. Defendant appointed James
17 Reed as its appraiser. Dkt. 36. Mr. Reed retired before the decision was made, and Defendant
18 appointed Andy Shemchuk. Dkt. 36.

19 Under "Appraisal" the policy provides:

20 If we and you disagree on the value of the Covered Property or salvage or the
21 amount of loss, either may make written demand for an appraisal of the loss or
22 salvage. In this event, each party shall select a competent and impartial appraiser.
23 The two appraisers shall select an umpire. If they do not agree, either may request
24 that selection be made by a court having jurisdiction. The appraisers shall state
25 separately the value of the Covered Property and amount of loss or salvage. If
26 they fail to agree, they shall submit their differences to the umpire. A decision
27 agreed to by any two shall be binding. Each party shall:

28 1. Pay its chosen appraiser; and

1. Bear the other expenses of the appraisal and umpire equally.

Dkt. 6-2, at 44.

After various attempts to resolve the matter, in December of 2008, Defendant filed a
motion in Cowlitz County, Washington Superior Court for appointment of an umpire pursuant to
the "Appraisal" provision of the policy. Dkt. 11, at 2. The court appointed David Draper,
formerly a superior court judge, as umpire. Dkt. 36. In April of 2009, the parties agreed to a
written protocol, which would govern the "Appraisal." Dkt. 14, at 100-107.

On September 28, 2009, Plaintiff filed this case in Cowlitz County, Washington Superior
Court. Dkt. 1, at 9-34. Plaintiff makes claims for breach of contract, "unfair and/or deceptive

1 business practices” pursuant to RCW § 19.86.010, *et seq.*, and “bad faith.” *Id.* Plaintiff seeks
2 damages, attorneys’ fees, costs. *Id.* Plaintiff also seeks an order from the Court prohibiting the
3 Defendant from violating the a) Washington Administrative Code, b) the Washington Consumer
4 Protection Act, and c) “assisting, aiding or abetting any other person or business engaged in or
5 performing any of the activities referred in a) or b).” *Id.* The case was removed in November of
6 2009 based on the diversity of citizenship of the parties. Dkt. 1.

7 While this case was pending, the appraisal process was ongoing. Dkt. 36. On February
8 24, 2010, the appraisal panel issued their decision in a “Memorandum of Appraisal.” Dkt. 36, at
9 6. The decision was signed by the umpire and Defendant’s appraiser. Dkt. 36, at 7. Plaintiff’s
10 appraiser did not sign the decision. Dkt. 36, at 2. During the appraisal, Plaintiff sought
11 \$1,500,809 and the Defendant valued the loss at \$1,020,254. Dkt. 36, at 9. The appraisal
12 panel’s decision was for an award to Plaintiff of \$1,230,492.00. Dkt. 36, at 7. Defendant has
13 paid Plaintiff the amount awarded by the appraisal panel. Dkt. 32, at 4.

14 Defendant now moves for an order confirming the appraisal award and dismissing any of
15 Plaintiff’s claims that are premised on Defendant owing Plaintiff anything further under the
16 policy. Dkts. 31 and 35. Plaintiff opposes the motion, arguing that the decision of the Appraisal
17 was “unfair.” Dkt. 34. Plaintiff argues that the motion to confirm the award should be denied.
18 *Id.*

19 **II. DISCUSSION**

20 **A. SUMMARY JUDGMENT - STANDARD**

21 Summary judgment is proper only if the pleadings, depositions, answers to
22 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
23 genuine issue as to any material fact and the moving party is entitled to judgment as a matter of
24 law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the
25 nonmoving party fails to make a sufficient showing on an essential element of a claim in the case
26 on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317,
27 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could
28

not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must present specific, significant probative evidence, not simply “some metaphysical doubt.”); *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, non specific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888-89 (1990).

B. CONFIRMATION OF AWARD

As a federal court sitting in diversity, this Court is bound to apply state law. *State Farm Fire and Casualty Co. v. Smith*, 907 F.2d 900, 901 (9th Cir. 1990). Accordingly, this Court must apply the law as it believes the Washington Supreme Court would apply it. *Gravquick A/S v. Trimble Navigation Intern. Ltd.*, 323 F.3d 1219, 1222 (9th Cir. 2003). “[W]here there is no convincing evidence that the state supreme court would decide differently, a federal court is obligated to follow the decisions of the state’s intermediate appellate courts.” *Vestar Dev. II, LLC v. Gen. Dynamics Corp.*, 249 F.3d 958, 960 (9th Cir.2001) (*quoting Lewis v. Tel. Employees Credit Union*, 87 F.3d 1537, 1545 (9th Cir.1996) (*internal quotation marks omitted*)).

1 The Washington Supreme Court has long held that “[t]he provisions of a fire insurance
2 policy requiring an appraisal are universally held to be valid and enforceable.” *Goldstein v.*
3 *National Fire Ins. Co. of Hartford, Conn.*, 106 Wash. 346, 354 (1919)(*internal citation omitted*).
4 Generally, “when an appraisal clause in an insurance policy is invoked, the award is conclusive
5 as to the amount of loss.” *Bainter v. United Pacific Ins. Co.*, 50 Win. App. 242, 246-47 (1988);
6 *see also Gouin v. Northwestern Nat’l Ins. Co.*, 145 Wash. 199, 259 P. 387 (1927). However,
7 “where the fairness of the appraisal process is questioned by the insured, through allegations of
8 bias, prejudice, or lack of disinterestedness on the part of either an appraiser or the umpire,
9 factual issues properly reserved for jury determination may arise.” *Bainter*, at 246-47.

10 Defendant’s motion for an order confirming the appraisal award and dismissing
11 Plaintiff’s claims for money owed under the contract (Dkt. 31) should be granted. In
12 Washington, insurance appraisals awards may be judicially confirmed and enforced. *Bainter*, at
13 247. Plaintiff has provided no evidence of “bias, partiality or lack of disinterestedness” on the
14 part of members of the appraisal panel. *Bainter*, at 247.

15 Plaintiff argues that the appraisal award in this matter was “unfair” because the panel
16 determined “that no work was required to bring the building into compliance with the local
17 codes, and thus awarded nothing.” Dkt. 34, at 11. Plaintiff argues that because they decided
18 whether work was required at all under the building codes, the appraisal panel made a coverage
19 determination. *Id.*, at 14-15. Plaintiff argues that the appraisal panel exceeded its authority by
20 making a coverage determination, the award is “unfair,” and so should not be confirmed. *Id.*, at
21 14.

22 Plaintiff makes no showing that the appraisal panel decided a coverage determination
23 when it awarded \$0 dollars in the “code compliance” category. The items listed in the appraisal
24 panel’s award correlated with the categories listed in the appraisal protocol, to which the parties
25 stipulated. Dkts. 14, at 100 and 36, at 6-7. Item A.1. provided the panel would determine, “[t]he
26 amount of replacement cost loss caused by the fire, valued at the date and time of the fire,
27 separately stating the cost of repair or replacement for each item or component reasonable and
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necessarily requiring repair or replacement to restore the building to its pre-fire condition.” Dkt. 14, at 100. The appraisal panel awarded Plaintiff \$1,125,203 in this category. Dkt. 36, at 7. (The appraisal panel also awarded Plaintiff for item A.3. - loss of personal property, item A.4. loss of computer equipment, etc., item A.5. loss for suspension of business, and item A.10.- costs associated with enforcement of laws regarding pollutants. Dkt. 36, at 7.) Item A.8. provided the appraisal panel would determine, “[t]he increased cost to repair, rebuild, or construct the building caused by enforcement of any building, zoning, or land use law.” Dkt. 14, at 101. Acknowledging that the panel awarded \$0 dollars for item A. 8.- “code compliance,” the Defendant’s appraiser, Mr. Shemchuk, states that he and the umpire “concluded the fire damage could have been repaired in a code-compliant manner for the amount awarded for item A.1., building repair costs, and that no additional work (or increased costs) would be caused by the enforcement of any building, zoning, or land use law.” Dkt. 36, at 3. Plaintiff makes no showing that the appraisal panel could not make a determination of the extent of damage in determining the amount of loss.

Plaintiff has failed to show that there is evidence from which a jury could conclude that the appraisal award was unfair. The award should be confirmed. Plaintiff’s claims for amounts due under the policy should be dismissed.

III. ORDER

Therefore, it is hereby, **ORDERED** that:

- Defendant Granite State Insurance Company’s Motion to Confirm Appraisal Award and Dismiss All Claims for Amounts Due Under Policy (Dkt. 31) is **GRANTED**;
- The appraisal award **IS CONFIRMED** and
- Plaintiff’s claims for amounts due under the policy **ARE DISMISSED**.

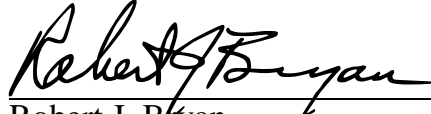
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1 The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel
2 of record and to any party appearing *pro se* at said party's last known address.

3 DATED this 22nd day of November, 2010.

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5 Robert J. Bryan
6 United States District Judge
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